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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~691~~ 28

FEDERAL POWER COMMISSION,
Petitioner,

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 585) is reported in 202 F. 2d 190; the Commission's (R. 105) appears in 9 F. P. C. 228.

Jurisdiction

The order of the Court of Appeals was entered December 31, 1952 (R. 614). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. § 1254 (1).

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Jurisdiction

The order of the Court of Appeals was entered December 31, 1952 (R. 614). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. § 1254 (1).

Questions Presented

1. Did the Federal Power Act abolish private proprietary rights to use waters from a navigable river?

2. Is the Federal Power Commission empowered to disregard arbitrarily payments made and obligations incurred by a licensee pursuant to long-standing contracts made at arm's length in acquiring water rights existing long prior to the passage of the Federal Power Act?

Statutes Involved

The statutes involved are adequately set forth in the Appendix to the Petition.

Statement

The Petition squarely raises the effect of the Federal Power Act on water rights validly existing under state law. The validity of the "International Paper Company rights" has been recognized by this Court in *International Paper Company* v. *U. S.*, 282 U. S. 399, and the "Pettebone-Cataract rights" by the courts of New York.

The fundamental error of the Petition lies in construing a regulatory statute as a confiscatory enactment.

Summary of Argument

1. The decision below is in accord with well recognized long standing principles laid down by this Court. The court

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below decided no question left open in *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373, in a manner inconsistent with the interpretation of the Act in prior decisions of this Court. Nor is the decision below in substantial conflict with "the reasoning"—and certainly not with the decision—of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, cert. denied 320 U. S. 792, rehearing denied 320 U. S. 815. Moreover, even if such a conflict in "reasoning" existed, it would be of no moment in view of Rule 38(5) (b) of this Court which sets forth, as a possible ground for granting certiorari, a conflict between "decisions" of the Courts of Appeals. Surely this Court will not concern itself with composing the different facets of reasoning among Courts of Appeals in the absence of a conflict between decisions. Furthermore, the language in *Niagara Falls* relied on by Petitioner is no more than *dictum*.

2. The court below correctly rejected a contention that the Federal Power Act abolished all private proprietary rights to use water from a navigable river for power purposes. The express terms of the Act itself, its legislative history, and the authorities construing it demonstrate beyond cavil that the Act was designed as a regulatory measure—to control but not to confiscate. The Act, while protecting the public interest by regulation, was also designed to encourage private investment in water power development; and to this end the Act recognizes the existence and validity of private water rights, simply subjecting such rights to the condition that their use for power purposes be subject to license by a regulatory commission.

Argument

We join issue with the contentions that private parties are not authorized under the Act to own water rights (Pet. Br. 13), that the United States has "the exclusive proprietary interest" in a navigable stream (Pet. Br. 14) and "the complete ownership" of its flow (Pet. Br. 15), that the Act effectively abolished private rights to use waters from a navigable stream (Pet. Br. 16, 23, 28) and that the United States is "concededly the ultimate owner of all water rights in navigable streams" (Pet. Br. 28). All these propositions we deny.

As background for our argument, we stand on the following propositions correctly decided by the court below. The water rights in question do not rest upon a claim of ownership of the running waters of the Niagara River, but rather upon a usufructuary property right recognized at common law and confirmed by judicial decisions (R. 594). The question whether the New York corporations here involved have a usufructuary right in the waters of the Niagara River depends upon New York law (R. 595). Under New York law a riparian owner's right to use the waters of a stream for power purposes is a part of his estate and a corporeal hereditament (R. 595). The courts of New York have upheld the validity of the Pettebone-Cataract rights in *Hydraulic Power Co. of Niagara Falls* v. *Pettebone-Cataract Paper Co.,* 198 App. Div. 644 (R. 597); and the validity of the International Paper water rights under state law has been recognized by this Court in *International Paper Co.* v. *U. S.,* 282 U. S. 399 (R. 597). It follows that the Pettebone-Cataract and the International Paper water rights are valid under the law of New York (R. 600). We do not understand that Petitioner here questions these propositions.

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Petitioner argues that Congress by the Act "and its predecessor statutes asserted its dominant authority" (Pet. Br. 9-10) over navigable waters of the United States so as to wipe out all private water rights valid under state law. We admit the existence of Congressional authority over navigable waters and that the Act delegated to the Commission regulatory powers over the use of private water rights for power purposes. But we strenuously deny that the Act abolished all private water rights.

Control, not confiscation, is the keynote of the Act. As this Court recently said, the objective of the Act was "the creation of a commission with functions and powers comparable to those of the Interstate Commerce Commission in the field of transportation." *U. S. ex rel. Chapman* v. *Federal Power Commission, et al.*, Nos. 28 and 29, this Term, decided March 16, 1953, slip opinion, p. 15. See also the statements as to the purposes of the Act in *Grand River Dam Authority* v. *Grand-Hydro, supra,* at 372, and in *First Iowa Coop.* v. *Federal Power Commission,* 328 U. S. 152, 171. Would Petitioner have it that the Interstate Commerce Act wiped out all private rights in property used for railroad purposes? To ask the question is to point its absurdity; yet that would be the analogue of Petitioner's position here.

The views of this Court, in recognizing the regulatory character of the Act, were correctly applied by the court below. That court observed that much of the difficulty in this case arose from a misconception of the Act, and characterized the Act as "purely a regulatory measure. A Federal license is not an original grant of authority but a permission to use a state's grant of authority" (R. 607). When state regulation conflicts with lawful Federal regulatory

action, state authority must yield to Federal, as held in *First Iowa*; but it by no means follows that the Act and a license thereunder constitute the source from which all water rights flow (R. 607).

The soundness of these judicial views is emphasized by the provisions of the Act itself. Read as a whole, it discloses an intent to provide a comprehensive scheme of Federal regulation governing the use of water rights for power purposes. But, at the same time, it repeatedly recognizes the existence of water rights rather than proclaiming their non-existence, which would be the case had the Act been designed to abolish them.[1] Indeed, the license constitutes merely a certificate that the exercise of water rights—valid under state law—does not interfere with legitimate Fed-

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[1]Section 3(11) defines "project" as including "water rights".

Section 4(b) empowers the Commission, in determining original cost of and net investment in a project, to require licensees to file a statement showing "the price paid for water rights" as well as lands and interests therein.

Section 9(b) requires that each applicant for a license submit evidence that it has complied with the requirements of state law "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes".

Under Section 14 it is provided that for purposes of determination of the amount to be paid by the United States in the event of taking over of a licensed project after the expiration of the license, "the values allowed for water rights * * *" shall not be "in excess of the actual reasonable cost thereof at the time of acquisition by the licensee"—thus evidencing a clear intendment that the payment then to be made shall allow a value for water rights.

Again, Section 21 provides that when any licensee can not acquire by contract the property of others necessary to a power project, it may acquire the same by the exercise of the right of eminent domain—thus recognizing the necessity of a licensee acquiring adverse property rights such as water rights, by condemnation (which imports compensatory payment) if not by contract.

Finally, Section 27 provides that "nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

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eral purposes, as the court below correctly observed (R. 607).

This Court has expressly held that the Act was not intended to interfere with the validity of water rights existing under the law of New York, and that a licensee of the Commission may not impair such rights without paying compensation therefor. *Ford & Son Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, 377-9.

The regulatory character of the Act distinguishes it entirely from the type of statute involved in *U. S.* v. *Chandler-Dunbar Co.*, 229 U. S. 53, on which Petitioner relies. That statute specifically asserted that the ownership in fee simple absolute by the United States of certain property was necessary for the purposes of navigation (R. 600) —a legitimate Federal purpose. In contrast, the Federal Power Act is bare of any such assertion; rather, it "expressed general policies and granted broad administrative and investigative power, making the Commission the permanent disinterested expert agency of Congress to carry out these policies". *U. S. ex rel Chapman* v. *Federal Power Commission, et al., supra,* at p. 15. The essential difference between the character of the statutes was properly stressed by the court below as the basis for its conclusion that *Chandler-Dunbar* is not authority for the Commission's position (R. 602).[2]

None of the cases cited by Petitioner at pages 14-15 detracts from the foregoing analysis. *Lewis Blue Point Oyster, Chicago etc. R. Co., Commodore Park* and *Willow*

[2]Congress knew of the *Chandler-Dunbar* situation at the time of its debates on the Act, and the managers of the bill were at pains to assure their colleagues that the bill was not designed to accomplish a specific taking as was the statute in *Chandler-Dunbar*. (59 Cong. Rec. 1040, 1431).

River all involved takings of a riparian owner's property by the United States acting in the specific exercise of its power to improve navigable waters; and *Sargent* in fact supports our view by acknowledging that the Act recognizes pre-existing water rights (269 U. S. at 338-9). *Appalachian Power* did not overrule *Ford,* as Petitioner implies at page 14, for subsequent to *Appalachian Power,* this Court expressly cited *Ford* with approval in *U. S.* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 734. Finally, this Court's recent opinion in *U. S. ex rel. Chapman* v. *Federal Power Commission, et al., supra,* confirms Respondent's position; Petitioner's reliance on the dissent there can carry no weight against the clear holding of the majority.

Despite the evident regulatory character of the Act, Petitioner advances the extraordinary contention that nothing in the Act indicates that private water rights in navigable waters were to be recognized by the Commission (Pet. Br. 16), and that it would require clear and unequivocal language in the statute to warrant holding that water rights used for power purposes were among the rights "saved" by the Act (Pet. Br. 23). To the contrary, we assert that there should never be imputed to Congress so drastic a step as abolishing all private water rights, country wide, in the absence of plain and unmistakable Congressional intent evidenced in the language of the statute or in its legislative background, or both. The fact is that this regulatory Act abolished no rights; therefore, there is no need for any language designed to save rights.

Nevertheless, Petitioner's misconception of the Act as confiscatory leads Petitioner to view as crucial Section 27 of the Act which reads:

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> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

On the basis of certain language in this Court's opinion in *First Iowa,* Petitioner asserts that the words "other uses" in Section 27 must be confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes (Pet. Br. 18). *First Iowa* merely held that when a state law as to the form of a power development conflicts with the Act, state law must yield to Federal; and it was only in this context—the clash of state and Federal regulation—that the Court had occasion to consider Section 27. *First Iowa* presented no issue as to the effect of the Act on the existence of property rights to use water; indeed, this Court recognized that the regulatory nature of the Act still left to the states their constitutional jurisdiction over such questions as the sufficiency of the legal title of an applicant to its property rights. 328 U. S. at 174, 178.

Moreover, Petitioner's misconstruction of Section 27 would make a strait jacket of its terms, by arbitrarily applying the rule of *ejusdem generis* and so subverting Congressional intent underlying the Act. That so-called rule is no more than a canon of construction to be resorted to in the absence of other evidence as to the meaning intended. Particularly, it should never be invoked to subvert the intention of the legislature. *U. S.* v. *Alpers,* 338

U. S. 680, 682; *Texas* v. *U. S.*, 292 U. S. 522, 534; *Mason* v. *U. S.*, 260 U. S. 545, 554; *Danciger* v. *Cooley*, 248 U. S. 319, 326.

Furthermore, where the literal words would bring about an end completely at variance with the purpose of a statute, the judiciary may properly use the legislative history to reach a conclusion. *U. S.* v. *The Public Utilities Commission of California, et al.*, Nos. 205 and 206, this Term, decided April 6, 1953, slip opinion, p. 19. The legislative background of the Act demonstrates a clear Congressional intent of "encouraging private enterprise and the investment of private capital" in power projects, consistent with the public interest. H. R. Rep. No. 61, 66th Cong., 1st Sess., p. 3 (1919); Sen. Rep. 180, 66th Cong., 1st Sess., *passim* (1919). In reliance on this Congressional purpose, many millions of dollars have been invested in property used for power purposes, including water rights. That the Act was not intended to disturb such rights was emphasized by Representative LaFollette, a member of the House Committee on Water Power which reported the bill. He asserted that the bill only allowed the Commission a supervisory power over those functions entirely within the states' jurisdiction, and that the bill was not designed to infringe any of the property rights of the states as to the bed and banks and to diversions of waters or any of the states' rules of property (56 Cong. Rec. 9109, 9810).

Indeed, diligent research into the extensive legislative background of the bill has failed to unearth any evidence that Congress intended the statute as a confiscatory measure designed to abolish with one sweep private water rights throughout the country. Had such a purpose been intended, would there not have been full debate of this issue in Con-

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gress and extensive hearings in Committee? Petitioner's construction of the Act cannot be assumed by innuendo, especially "in view of the dearth of legislative discussion of the matter." See *U. S.* v. *The Public Utilities Commission of California, supra,* at p. 14. This dearth is doubtless explained by the provisions of Section 9(b) of the Act conditioning the issuance of a license upon a showing that the applicant has complied with the requirements of state law with respect to the use of water for power purposes.

Moreover, Congressional history reveals that Section 27 appears to have been added as a disclaimer in the excess of caution often displayed by lawyers and lawmakers. Representative Taylor, a member of the House Committee on Water Power, was responsible for the addition of Section 27 to the Act (56 Cong. Rec. 9115). Of Section 27 he commented:

> "That section not only recognizes and protects our plain constitutional vested water rights, but it is fair and honest, * * *" (56 Cong. Rec. 9912).

And later:

> "This special water power committee feel that where people now have legally recognized rights of various kinds, we did not want to rip them up.
>
> * * * * *
>
> That is one of the things that all of the western Members have earnestly and jealously guarded against—not to legislate a man out of his existing

> rights, either in agricultural claims or water rights or coal or oil * * *." (56 Cong. Rec. 10033-4).[3]

Thus the Act and its background demonstrate beyond peradventure the Congressional design to formulate a system of Federal regulation over the use of water for power purposes. This is far short of Petitioner's view that the Act wiped out all private water rights by Sections 1 through 26, except those expressly "saved" by Section 27.

The decision of the court below correctly interpreted the Act as an instrument of control, not of confiscation. The court went to the heart of the matter when it referred to the Commission's misconception of the Act (R. 607), a misconception repeated in Petitioner's brief. And the court correctly disposed of Petitioner's reliance on *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787,

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[3]And see the following remarks by Representative Mondell during the Congressional hearings:

> "This act should contain * * * some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water'. * * *
>
> That is simply a statement of facts. It is not a new law. It is simply a recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things." (Hearings before House Committee on Water Power, 65th Cong., 2nd Sess. pp. 619-20).

After Section 27 was appended to the bill, Representative Mondell remarked:

> "I am glad the provision the gentleman [Representative Taylor] urged, and which I also urged in my hearing before the committee, is in the bill. It is highly important, and yet the gentleman knows that it is simply a declaration of fact; it is simply the recognition of a fact; but it is important to have it in the bill." (56 Cong. Rec. 9115).

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cert. denied 320 U. S. 792, rehearing denied 320 U. S. 815. That case decided only that Section 23(a) of the Act, in providing for a fair value license for projects operated under a permit existing at the date the Act became effective, had application only to projects then operating under continuing Federal permit; and that the Power Company had no such permit and therefore was not entitled to a fair value license. The "reasoning" in that case relied on in Petitioner's brief was in fact, as the court below correctly held, not necessary to the decision and premised on the erroneous assumption that the International Boundary Waters Treaty of 1910 had the effect of destroying all diversionary water rights under New York law and converting the United States into the fountainhead of any subsequent private right to use the amount of water allotted to the United States by the Treaty (R. 606-7). Petitioner in this Court expressly disavows the Second Circuit's analysis of the Treaty, deleting all reference to the Treaty from the quotation from the Second Circuit's opinion (Pet. Br. 24-5) and claiming that the Treaty has no relevance (Pet. Br. fn. 17). But the Treaty was an essential ingredient in the reasoning of the Second Circuit; and by rejecting the Treaty here, Petitioner rejects the fundamental basis of the "reasoning" of the Second Circuit.

In closing, Petitioner attempts a distinction between the relationship of the Commission to a licensee and of a licensee to private parties (Pet. Br. 25-28). But the attempted distinction evades the fundamental point at issue: the only basis in law for disallowing Respondent's payments for water rights must be that all such rights were abolished by the Act. *Regents of the University System of Georgia* v. *Carroll,* 338 U. S. 586, has no bearing, because it presented

no question of abolishing rights between a licensee and a regulatory agency. There this Court held that the Federal Communications Commission had no authority to determine the validity of a contract between a licensee and a third party; and that therefore the fact that the Commission had required disaffirmance of such a contract, as a condition to the grant of a license, did not constitute a defense in an action for breach of the contract against the licensee. The case does not support Petitioner's alleged power to arbitrarily require Respondent to disaffirm its long standing contracts since in *Regents* this Court expressly assumed the validity of the action of the regulatory Commission, the very point at issue here.

In any event, whatever comfort Petitioner attempts to derive from *Regents* is short lived, for immediately thereafter its argument reverts to its favorite contention that the United States is the ultimate owner of all water rights, and that the court below in recognizing the existence of private water rights failed to follow the "principles" purportedly set forth by this Court in *Chandler-Dunbar* (Pet. Br. 28-9). However, no amount of strained argument can obscure the fundamental proposition that the Act is a measure of control, not confiscation.

Thus the court below decided no question left open in *Grand River Dam Authority* v. *Grand-Hydro, supra,* in a manner inconsistent with the interpretation of the Act in prior decisions of this Court. Petitioner's attempt to invoke the dissent there (Pet. Br. 26-7) is as misguided as its endeavor to call up the dissent in *U. S. ex rel Chapman* v. *Federal Power Commission et al., supra* (Pet. Br. 15). As shown above, the decision of the court below properly interprets the statute as a regulatory measure,

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and this interpretation is consistent both with prior decisions of this Court and with the Congressional purpose underlying the Act.

Finally, as to Petitioner's apparent attempt to show that the decision below will prejudice the interests of the United States (Pet. Br. 11-13). The argument is erroneous to the extent that it asserts that the Federal Power Commission fixes rates charged by the licensee, for those are fixed by the New York State Public Service Commission and Section 19 of the Act expressly denies to the Federal Power Commission jurisdiction over such matters. But more important, Petitioner's theory of abolishment is totally inconsistent with the Congressional intent of encouraging private investment. For if Petitioner's theory were to prevail, "original cost" and "net investment" would be reduced because the dollar values of water rights would be eliminated, and hence the capital value of the project property of many licensees would be slashed. Also it is clear that to the extent that Respondent would be required to transfer sums to amortization reserve account, Respondent's surplus and its earnings available for dividends and other corporate purposes would be correspondingly reduced; and if the United States were to exercise its right to take over licensee's project at the expiration of its license, the amount received at that time by Respondent and those who had invested in its project would be correspondingly reduced. These adverse effects, scarcely designed to further the Congressional intent of encouraging private investment in power projects, are the necessary consequence of Petitioner's position.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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